U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: June 26, 1991
CASE NO. 83-CTA-288

IN THE MATTER OF

U.S. DEPARTMENT OF LABOR,

v.

CITY OF TACOMA, WASHINGTON.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. v 1981),[1/] and promulgated regulations. The Grant Officer filed exceptions to the Decision and Order (D. and 0.) of the Administrative Law Judge (ALJ) reversing the Grant Officer's disallowance of various CETA expenses. The case was accepted for review as provided under the applicable regulations.

BACKGROUND

On July 27, 1983, the Grant Officer issued his final determination disallowing approximately $18,366 in costs under four subgrants. Joint Exhibit (JX) 1B at 10. The grantee, City of Tacoma, requested a hearing on the amounts disallowed under

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1/ CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

three of the subgrant audits. JX 1A. The ALJ, on the merits, affirmed the Grant Officer's disallowances totaling $14,063.59. D. and 0. at 6. He concluded, however, based on Citv of Edmonds v. United States Department of Labor, 749 F.2d 1419 (9th Cir. 1984), that he was required to reverse the disallowances because the Grant Officer lost jurisdiction by failing to make a final determination within 120 days after receiving the audit.

After the case was accepted for review, the Grant Officer requested a stay pending the Supreme Court's resolution of the issue decided in Edmonds. In Brock v. Pierce County, 476 U.S. 253, 266 (1986), the Court held that the Secretary does not lose the power to recover misused CETA funds after the expiration of the 120-day period. The Secretary thereafter lifted the stay and established a briefing schedule. The Grant Officer moved to remand, stating that because the only exception filed was his own contesting the ALJ's jurisdictional holding, there was no need for a briefing schedule and the case should be remanded "for appropriate action? The Secretary denied the motion, concluding that the case was properly before her for review and allowing the parties to brief the merits of the ALJ's decision disallowing specified CETA expenses?

DISCUSSION

A. Procedural Issues

The grantee continues to argue that the ALJ's decision

2/ The Grant Officer elected not to file a further brief.

reversing the disallowed CETA expenses became final thirty days after service of the ALJ's decision. Memorandum of the City of Tacoma (Mem.) at 2. This contention was considered and rejected in the Order Denying Motion to Remand at 3 n.2. That decision constitutes the law of the case and I will not consider it further. In re Easebe Enterprises, Inc., 900 F.2d 1417, 1421 n.3 (9th Cir. 1990); United States v. Mills, 810 F.2d 907, 909 (9th Cir.), cert. denied, 484 U.S. 832 (1987).

The grantee next contends that, under the terms of the April 17, 1985, Order Accepting Case for Review, the ALJ's decision became final when the Edmonds court denied the Grant Officer's petition for rehearing. Mem. at 2-3. This contention is rejected because once a case is accepted for review, as here, there can be no final decision until the Secretary issues an order. 20 C.F.R. § 676.91(f).

Additionally, the grantee makes several allegations that the Grant Officer improperly delayed the proceedings to seek the benefit of a favorable ruling in Pierce County. Mem. at 3-4. The record reflects that the grantee was served a copy of the Grant Officer's request to await the decision in Pierce Countv before deciding the instant case and the grantee did not oppose the request. I-therefore conclude that the grantee has waived its right to contest the order staying the proceedings.

B. Disallowed CETA Expenses

As noted by the ALJ, 20 C.F.R. § 676.34 requires that all CETA recipients establish and maintain a financial management

system which meets the standards of 41 C.F.R. § 29-70.207 (1984).[3/] That section requires that the system established: "provides for adequate control of grant or agreement funds and other assets: ensures the accuracy of financial data: and provides for operational efficiency and for internal controls to avoid conflict of interest situations and to prevent irregular transactions or activities/' 41 C.F.R. § 29-70.207-2. It further requires that records be maintained "which identify adequately the source and application of funds for grant or agreement supported activities" and that these records be supported "with source documentation." 41 C.F.R. § 29-70.207-2(b),(g). The recipient% responsibility to assure that subrecipients also adopt these standards is explicit. 41 C.F.R. § 29-70.207-3.

1. Tacoma Indian Center Subgrant

In sustaining, pursuant to Audit Control No. 2186, the Grant Officer's disallowance of $921 for administrative expenses, the ALJ applied the criteria in 20 C.F.R. § 676.88(c), for allowing certain questioned CETA costs.[4/] The ALJ concluded that the

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[3/] The regulations in 41 C.F.R. Part 29-70 were last published in C.F.R. in 1984. They have been superseded, but remain applicable to all contracts, such as the grants here, entered into prior to April 1, 1984. 41 C.F.R. Subtitle A [Note].

[4/] Section 676.88(c) states:

> costs associated with ineligible participants and public service employment programs may be allowed when the Grant Officer finds:
> (1) The activity was not fraudulent and the violation did not take place with the

(continued...)

grantee had "not met its burden of proving that there was an adequate and properly operating financial management system in place during the administration of the program." D. and 0. at 4.

The grantee does not dispute that Tacoma Indian Center's financial management system was inadequate, see Transcript at 58, but instead argues that the responsibility for establishing an adequate and properly operating system "is on the subgrantee, not the City." Mem. at 6. This contention must fail. Section 676.88(c)(3) allows for waiver of questioned costs only when management systems and mechanisms required in the regulations are properly followed. Section 29-70.207 requires that subgrantees have an adequate financial management system and places responsibility on the grantee to "maintain effective control over and accountability for all project funds, property, and other assets." 41 C.F.R. § 29-70.207-2(c). (Emphasis added). Moreover, it is well established that a grantee is responsible

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4/(. ..continued)

knowledge of the recipient or subrecipient; and

(2) Immediate action was taken to remove the ineligible participant; and

(3) Eligibility determination procedures, or other such management systems and mechanisms required in these regulations, were properly followed and monitored; and

(4) Immediate action was taken to remedy the problem causing the questioned activity or ineligibility; and

(5) The magnitude of questioned costs or activities is not substantial.

for the CETA violations of its contractors and subgrantees.[5/] 29 U.S.C. § 816(k); Chicano Education and Manpower Services v. U.S. Dept. of Labor, 909 F.2d 1320, 1328 (9th Cir. 1990); San Diego Regional Employment and Training Consortium v. Donovan, 704 F.2d 288, 293 (9th Cir. 1983). Inasmuch as the grantee has failed to satisfy all of the criteria of Section 676.88(c), there is no discretion to allow the questioned costs under this subgrant. In the Matter of Louisiana Department of Labor, Case No. 82-CPA-32, Sec. Dec. Aug. 23, 1990, slip op. at 3-4. See also 41 C.F.R. § 29-70.207-3.

2. Tacoma-Pierce County Opportunities Industrialization Center Subgrant

Under this subgrant, the ALJ noted that, pursuant to Audit Control No. 2199, the Grant Officer disallowed $2,994.72 in administrative expenses based on a lack of supporting documentation as required by 20 C.F.R. § 676.41. The ALJ concluded that the grantee attempted to establish that audit reports from the previous year demonstrated that satisfactory records were maintained. Because no evidence was introduced, however, he found that the Grant Officer properly disallowed these costs. D. and O. at 4-5.

5/ The only exception to this rule of which I am aware, and which does not apply in this case, is where the Department of Labor selected and directly supervised a subgrantee. U.S. Department of Labor v. New York City Department of Employment, Case No. 82-CTA-343, Sec. Dec. Sept. 29, 1987, slip op. at 6-8.

The grantee contends that testimony[6] demonstrates that audit reports of the questioned year established that satisfactory records were maintained. Mem. at 7. There are at least two problems with this contention. First, Section 676.41 requires documentation of expenses, not testimony that such documentation exists. Second, the documentation referred to in the testimony, as the ALJ noted, D. and 0. at 4, pertains to an earlier year and not the year in question.

The grantee also argues that it should not be responsible for this amount as there was no reason it should have been alerted to any impropriety in the administration of the program. Mem. at 7. This contention is rejected because the grantee is responsible for CETA violations of its subgrantees. Chicano, 909 F.2d at 1328. I therefore affirm the disallowance of $2,994.72 in administrative expenses.

Also under this subgrant, a total of $5,811.13[7] representing rent, telephone and operational expenses, JX 2 at 24, was disallowed based on possible duplicate billing to other grants. Although the grantee claimed no knowledge of the multiple billing, the ALJ found that, in light of the grantee's failure to produce adequate documentation, the Grant Officer properly disallowed these expenses. D. and 0. at 5.

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[6] The grantee provides no record cite. It seems the referenced testimony is at page 40 of the transcript.

[7] This amount is mistakenly referenced by the ALJ, D. and 0. at 5, and the grantee, Mem. at 7, as $5,811.34. See JX 1B at 7.

Alleging that it has no authority to audit contracts with other agencies, the grantee contends that it had no opportunity to discover the alleged multiple billings. The grantee expresses particular frustration at this ruling in that the expenses were something over which it had no knowledge or control. Mem. at 8-9.

Notwithstanding that control over a subgrantee's expenditures may sometimes be difficult to achieve, the regulations impose that responsibility on the grantee. 41 C.F.R. §§ 29-70.207-2(c), and 29-70.207-3. The regulatory scheme takes into account that states and municipalities receive large sums of federal money under CETA programs in exchange for federal regulation whose purpose is to assure that the money is properly expended. See Commonwealth of Kentucky, Department of Human Resources v. Donovan, 704 F.2d 288, 298-99 (6th Cir. 1983). Because there is no documentation properly allocating these costs among the various grants, I affirm the disallowance of $5,811.13. See 20 C.F.R. § 676.41(a), (c).

3. Puyallup Indian Tribe Subgrant

The Grant Officer disallowed $4,336.74 in wages, fringe benefits, and administrative costs, pursuant to Audit Control No. 2206, based on the grantee's failure to produce the required documentation and to establish and maintain an adequate financial management system. JX 1B at 10; D. and O. at 5. The grantee contended that Section 676.88(c) should have been invoked to allow $1,680.75 of the above amount representing administrative

costs. The ALJ, however, found the amount properly disallowed because the grantee failed to show that an adequate and properly operating financial system was in place.

In contesting this disallowance, the grantee merely alleges that each element of Section 676.88(c) has been satisfied and that there was no evidence or testimony at the hearing that the system was not adequate and properly operating. Mem. at 9. Because the ALJ's finding that there was not an acceptable financial system in place is supported by the audit and not contradicted by any other evidence, however, it is affirmed. See Optimal Data Corn. v. United States, 17 Cl. Ct. 723, 727 (1989). This finding precludes relief under Section 676.88(c), see discussion at page 5 supra, and requires that I uphold the disallowance of $1,680.75.

As to the remaining $2,655.99, representing wages and fringe benefits, the grantee alleged the existence of new supporting documentation. The ALJ found those documents were copies of time sheets previously considered by the Grant Officer and that the amount was properly disallowed for inadequate documentation. D. and 0. at 5.

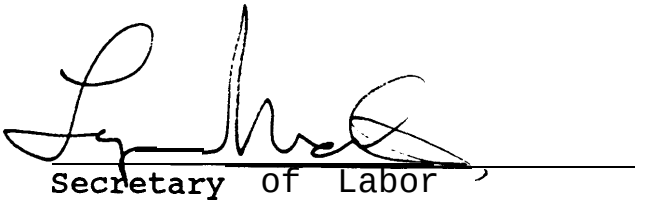
The grantee continues to assert new documentation, arguing that had it been available at the time of the audit, it is unlikely that these costs would have been questioned. Again, the grantee has failed to identify the evidence referred to, see note 6 and accompanying text supra, and has not challenged the ALJ's finding that new documentation was considered by the Grant

Officer. Accordingly, there is no basis for me to disturb those findings and the disallowance of $2,655.99 is affirmed.

ORDER

The ALJ's decision reversing the disallowances based on loss of jurisdiction is vacated. The grantee, City of Tacoma, is ordered to pay $14,063.59 in disallowed costs to the Department of Labor. This payment shall be from non-Federal funds. See Milwaukee County, Wisconsin v. Donovan, 771 F.2d 983, 993 (7th Cir. 1985).

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

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Case No. : 83-CTA-288

Document : Final Decision and Order

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